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Slamming: The Unauthorized Change of a Consumer's Telephone Service Provider

Updated April 7, 2006

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CONTENTS

SUMMARY

MOST RECENT DEVELOPMENTS

BACKGROUND AND ANALYSIS

- Federal Communications Commission Policies

- The Telecommunications Act of 1996 — New Rules to Combat Slamming

 - Consumer Liability

 - Verification

 - Consumer Assistance

 - Additional Issues

- General Accounting Office Reports

- Congressional Activity

 - Action in the 106th Congress

 - Action in the 105th Congress

- Industry Initiatives

- Issues

 - Legislation

 - PIC Freeze Programs and Charges

 - Slamming Statistics

- Legislation in the 105th Congress

- Legislation in the 106th Congress

FOR ADDITIONAL READING

Slamming: The Unauthorized Change of a Consumer's Telephone Service Provider

SUMMARY

Changing a consumer's telephone service provider without his/her knowledge or consent is known as "slamming." This unauthorized change can occur for several reasons ranging from computer or human error to unscrupulous or illegal marketing practices. Regardless of the reason, slamming has a negative impact on both consumers and suppliers of telecommunications services.

Despite existing regulations to prevent such practices and the overall condemnation of such activities, slamming continues to be a consumer concern. According to data released by the Federal Communications Commission (FCC) 1,932 slamming complaints were filed in 2005 with the FCC Consumer Affairs Bureau resolving about 3,500 consumer complaints involving over 300 telephone carriers, in 2004. The issue of slamming is expected to continue as competition in the provision of intrastate long distance and local telecommunications services becomes more widespread.

A significant level of consumer complaints, coupled with the potential for further abuses in an increasingly competitive marketplace, have prompted action to examine and strengthen deterrents to this practice. The FCC has been actively enforcing existing rules and continues to address outstanding slamming issues. The FCC, in a series of rulemakings, adopted rules that strengthen deterrents to slamming in compliance with provisions contained in the 1996 Telecommunications Act (P.L.104-104). All of these rules are now in effect. Under these revised rules, states are given the option of processing slamming complaints, and numerous states have chosen to do so. The telecommunications industry has condemned intentional slamming and is also taking steps to eliminate the practice.

Despite these activities, many members of Congress felt that additional legislation was needed to address this issue. The 105th Congress actively examined this issue, but adjourned without passing legislation. Two measures, S. 58 and S. 1084, introduced in the 106th Congress were not enacted. No legislation addressing slamming was introduced in the 107th or 108th Congress, nor in the 109th, to date.

Although no one supports the practice of intentional slamming, some concerns have been expressed over the approaches being taken to curb this practice. One concern has focused on the necessity for, or specific provisions contained in, legislative measures, with the implementation of primary interexchange (long distance) carrier (PIC) freeze program among the most contentious. The FCC, on March 14, 2002, adopted a notice of proposed rulemaking to examine the charges imposed by local exchange carriers for PIC changes and in a February 10, 2005 action, modified the rate structure that was set in 1984. Another concern relevant to the slamming debate, that is the methodology used by the FCC to develop slamming statistics, also generated controversy.

Whether FCC-adopted slamming rules will be a sufficient deterrent to stop the practice of slamming, and negate congressional interest to enact legislation, remains to be seen.

MOST RECENT DEVELOPMENTS

The significant increase in the unauthorized change of a consumer's telephone service provider, a practice known as slamming, has prompted regulators, Members of Congress, and industry representatives to examine ways to protect consumers against this growing problem. The 105th Congress held several hearings and introduced many bills to address this issue, but adjourned without passing legislation. Two measures to further strengthen slamming regulations, S. 58, and S. 1084, were introduced in the 106th Congress, but neither was enacted. No legislation addressing slamming was introduced in either the 107th or 108th Congress and none has been introduced in the 109th Congress, to date.

Federal activity now rests with the FCC, as it attempts to enforce its rules to deter slamming. The FCC continues to take actions to enforce and further strengthen its slamming rules. The last of these new rules went into effect on November 28, 2000. Under these revised rules, states have the option of processing slamming complaints, and numerous states have opted to do so. On March 14, 2002, the FCC initiated a notice of proposed rulemaking to examine PIC-change charges and in a February 10, 2005 action modified the rate structure that was set in 1984. A second further notice of proposed rulemaking, issued on March 17, 2003, imposing additional requirements on third-party verification services became effective on July 21, 2003. Whether Congress will feel that the implementation of current FCC rules and enforcement efforts negate the need for further legislative action remains unclear.

BACKGROUND AND ANALYSIS

Since the development of competition in the provision of long distance telecommunications services, consumers have been able to select the carrier of their choice, from among approximately 500 companies, to provide that service. However, an increasing number of consumers have that choice taken away from them when their designated telephone service provider is changed without their knowledge or consent. This unauthorized change can occur for several reasons, ranging from computer or human error to unscrupulous or illegal marketing practices. Regardless of the reason, this unauthorized switching, known as "slamming," has a negative impact on both the consumers and suppliers of telecommunications services. Consumers not only lose the right to subscribe to their carrier of choice; they may also be subject to lower quality of service, higher rates, or lose special features or premiums offered by their designated carrier. Consumers often do not realize they have been slammed until they find unfamiliar names or charges on their telephone bills. For some who do not examine their bills, such changes can go undetected for months or remain unnoticed indefinitely. Telecommunications carriers are also harmed by slamming, as this practice distorts the marketplace by increasing the customer base and revenues of the carrier that has illegally switched the consumer at the expense of the legitimately chosen carrier.

Despite existing regulations to prevent such practices and the overall condemnation of such activities, slamming continues to occur with significant frequency. According to data released by the Federal Communications Commission (FCC), slamming continues to be a major consumer concern, with 36,220 inquiries and 1,932 complaints filed in 2005. The

FCC's slamming team, which is part of the Consumer and Governmental Affairs Bureau, resolved approximately 3,500 slamming complaints involving over 300 telephone carriers, resulting in consumer refunds totaling \$800,000 in 2004. Since many consumers who are the victims of slamming may not file complaints, and over 50 million carrier selection changes are recorded each year, it is assumed that filed complaints represent a minority percentage of the actual problem. The potential for slamming is expected to increase as competition in the provision of intrastate long distance and local telecommunications services becomes more widespread.

A significant level of consumer complaints, coupled with the potential for further abuses in an increasingly competitive marketplace, has prompted action to examine and strengthen deterrents to this practice. How to prevent slamming is being addressed on several fronts. The FCC has revised its rules with an eye to strengthening its regulations and increasing penalties for violators. The 105th Congress while actively examining this issue, adjourned without passage of legislation. Similarly two measures (S. 58, S. 1084) introduced in the 106th Congress were not enacted. No legislation addressing slamming was introduced in the 107th or 108th Congresses and none has been introduced in the 109th Congress, to date. The industry is attempting to self-regulate and has put forth proposals to stop this activity. (State regulatory bodies and legislatures, and law enforcement officials, are also taking actions to stop this practice. However, a review of state-level activities regarding slamming is beyond the scope of this issue brief.)

Federal Communications Commission Policies

The FCC currently has policies and rules to protect consumers from the unauthorized switching of their long distance carriers, and it enforces them through the investigation of individual complaints. The FCC adopted its rules in response to the numerous complaints it received from state regulatory bodies, telecommunications carriers, and individual consumers. FCC rules currently require a long distance company to obtain a subscriber's authorization before a switch can occur. Authorization can be obtained in writing or can be confirmed orally. Specific requirements relating to what must be contained in written and oral authorizations are enumerated in the regulations. Furthermore, FCC rules protect consumers from paying potentially exorbitant rates. If a subscriber has been a victim of an unauthorized change, he/she is absolved of payment for up to 30 days; refunds of charges are set at 150 percent, split between the authorized carrier (100%) and the subscriber (50%). Carriers proven to be in violation of FCC rules are subject to fines and penalties. (See Telecommunications Act of 1996, for a discussion of the FCC's newly adopted more stringent regulations.)

From April 1994 to the end of 1999, the FCC imposed final forfeitures against 8 companies for \$10.3 million, entered into consent decrees with 12 carriers with combined payments of \$2.7 million and proposed \$7.6 million in proposed notices of apparent liability against 5 companies. The FCC continues to take enforcement actions against violators. According to the FCC in the past decade its Enforcement Bureau has taken slamming enforcement actions totaling nearly \$30 million. FCC action in 2004 by the Consumer and Governmental Affairs Bureau, on behalf of individual consumers, resolved about 3500 slamming complaints involving more than 300 carriers resulting in \$800,000 in consumer refunds. In its first joint federal/state effort, the FCC, working with 14 state agencies, filed on June 20, 2002, a \$1.2 million fine against WebNet Communications Inc. of McLean, Va.,

for 20 alleged violations. In an April 21, 1998 action, the FCC levied its most severe penalty for slamming to date. For the first time, it revoked the operating authority of a telecommunications provider for slamming violations and levied a multi-million dollar fine. This action was taken against the Fletcher Companies, a group of long distance telephone companies, for engaging in slamming and numerous other violations of the Communications Act and FCC rules. These companies, and their principals, are barred from providing interstate telecommunications services without the prior consent of the FCC. Furthermore, the FCC assessed forfeitures totaling \$ 5.7 million but has never been able to collect. According to the FCC, it received more than 1,400 complaints against the Fletcher Companies, the majority of them filed from mid-1996 through 1997. Although these companies stopped providing services in 1997, during the FCC's investigation, this action was taken, according to the FCC, to ensure that none of these companies can resume operation and "engage in slamming or other conduct ... harmful to consumers."

Provisions contained in the Telecommunications Act of 1996 (see discussion below) expand the scope of the FCC's authority to address the problem of unauthorized switches. The FCC, in a December 17, 1998 order and subsequent reconsiderations, expanded upon and adopted more stringent rules to combat slamming.

The Telecommunications Act of 1996 — New Rules to Combat Slamming

The Telecommunications Act of 1996, which was signed into law on February 8, 1996 (P.L. 104-104), resulted in a major rewrite of the 1934 Communications Act (47 U.S.C. 151 et.seq.). Section 258 of the Telecommunications Act of 1996, which became Section 258 of the 1934 Communications Act, as amended, expands jurisdiction over, and creates a new penalty for, any telecommunications carrier that illegally changes a subscriber's designated telecommunications carrier.

Section 258 (a) prohibits telecommunications carriers from changing a subscriber's selection of both telephone exchange (local) and toll (long distance) service, unless the change complies with verification procedures prescribed by the FCC. The section expands the FCC's authority over such activity to include local as well as long distance service. State utility commissions are also permitted to enforce the procedures with respect to services within their state boundaries.

Section 258 (b) creates a new penalty, in addition to already existing penalties contained in law, for those who violate FCC verification procedures. Any telecommunications carrier that violates those procedures and collects charges for such service is required to pay the subscriber's properly designated carrier all the charges collected from that subscriber since the change occurred. The requirement would prevent violators from receiving financial rewards for the illegal switch. The FCC, in a December 17, 1998 action (CC Docket No. 94-129), adopted new regulations in compliance with the 1996 Act. These rules, with the exception of the liability provisions, went into effect in April 1999. (See *Federal Register*, February 16, 1999, vol. 64, no. 30, pp. 7746-7762.) The liability provisions were stayed by the D.C. Court of Appeals. On May 3, 2000 the FCC issued revised slamming liability rules (See *Federal Register*, August 3, 2000, vol. 65, no. 150, pp. 47687-47693). which met court approval and the stay was lifted on June 27, 2000. These revised liability rules have since

been enacted, taking effect on November 28, 2000. (See *Federal Register*, November 8, 2000, vol. 65, no. 217, p. 66934.)

The major provisions of these rules focus on three areas: consumer liability; verification methods; and consumer assistance.

Consumer Liability. The rules absolve slammed consumers of liability for charges incurred for the first 30-day period after an unauthorized switch. In cases where payment was made by the consumer, the unauthorized carrier must refund 150% of the charges to the authorized carrier. The authorized carrier is allowed to keep an amount equal to 100 percent of the consumer's bill with the remaining 50% returned to the consumer. Primary enforcement responsibility has been given to the states with the FCC assuming responsibility in those states unwilling or unable to undertake this role or if a complainant expressly indicates it wishes the FCC to resolve the matter. According to the FCC, 37 states, the District of Columbia, and Puerto Rico, have chosen to take on this responsibility. (See [<http://www.fcc.gov/slamming/states.html>] for a listing of these states.)

Verification. Verification procedures used to confirm carrier switches are strengthened and extended to include a number of circumstances. There are a number of acceptable methods to verify changes, a consumer signature on an authorization paper form (i.e., a Letter of Agency; LOA), an electronic authorization (usually a customer initiated call to a toll-free number), a verification by an independent third party, and the more recently approved use of an Internet-based LOA (see Additional issues below). These verification methods are applied to both inbound calls (that is, calls initiated by consumers) as well as telemarketing calls initiated by carriers. Verification rules are also applied to changes in local as well as long distance carriers, but wireless carriers are exempt. The FCC has also applied verification procedures to the practice of implementing carrier freeze requests. In addition, the FCC rules require that solicitations for such freezes be clear and that the consumer be informed as to how such a freeze may be lifted. (See PIC Freeze Programs under Issues, below, for an explanation of this practice.)

The FCC also noted that these verification procedures do not preempt state law; these verification methods are to be used as a state minimum, but additional verification procedures may be adopted for intrastate carrier changes.

In a April 8, 2003 action (*AT&T v. FCC*, D.C. Cir., No. 01-1485, 4/8/03) the U.S. Court of Appeals for the District of Columbia found that the FCC exceeded its statutory authority in enforcing certain of its slamming rules relating to customer verification. While not remanding the FCC's rules the court did vacate fines totaling \$80,000 imposed on AT&T. The FCC had imposed a fine on AT&T for slamming when, despite compliance with the FCC's procedures, an unauthorized person, without the knowledge of the line subscriber, authorized the switch. The court found that the FCC's requirement that the telecommunications carrier verify that the actual subscriber, and not just the person answering the line and claiming to have authority to authorize a carrier switch, authorize the switch exceeded the FCC's statutory authority. The court stated that the statute does not require actual authorization but only requires that the carrier get verification. Furthermore the court stated that the FCC's requirement that the carrier obtain "actual authorization" gives carriers "a virtually impossible task: guaranteeing that the person who answers the telephone is in fact authorized to make changes to that telephone line."

On March 17, 2003, the FCC issued a second further notice of proposed rulemaking (CC Docket 94-129; FCC 03-42) strengthening requirements on third-party verification procedures. These rules became effective July 21, 2003.

Consumer Assistance. New initiatives are established to ease the filing of consumer complaints and speed their resolution. These include the establishment of a website to allow consumers to file complaints electronically and obtain on-line consumer protection information; the establishment of a toll-free number at the FCC to enable consumers to file complaints over the telephone; and the establishment of an electronic interface with carriers to improve industry response time and speed FCC resolution of complaints. The FCC, in conjunction with CC docket 98-170, has also adopted rules that establish truth-in-billing and billing format principles to enhance a consumer's ability to detect slamming. These rules establish requirements that, according to the FCC, are "intended to protect consumers against inaccurate and unfair billing practices."

Additional Issues. A number of issues not addressed in the April 13, 2000 reconsideration order were addressed in a subsequent FCC order adopted on July 21, 2000. These rules went into effect on April 2, 2001. These include permitting the use of Internet LOAs in compliance with provisions contained in the E-Sign Act (P.L. 106-229), thereby allowing carrier changes to be made by consumers via the Internet; retaining the three-way call as a verification method but requiring the carrier's sales representative to drop off the call once the connection has been established between the subscriber and the third party verifier; the institution of new complaint reporting requirements for carriers which require carriers to submit semiannual reports to the FCC's Enforcement Bureau containing, among other information, the number of slamming complaints they have received; and adoption of carrier registration requirements that prevent slammers from evading detection simply by changing their names.

General Accounting Office Reports

The General Accounting Office (GAO) at the request of Senator Collins, Chairman of the Permanent Subcommittee on Investigations, Committee on Government Affairs, undertook an investigation into the general issue of slamming, FCC and state regulatory efforts to curtail slamming, and a case study of the Fletcher Companies, a long distance provider that has come under regulatory scrutiny, and has since had its license revoked, for slamming complaints. This report, *Telephone Slamming and Its Harmful Effects*, was released in conjunction with testimony given at Subcommittee hearings on April 23, 1998. (For a full citation see "For Additional Reading," below.)

Some of the major conclusions reached by the GAO, based on their three-month investigation into slamming practices and regulation, are as follows:

- "Neither the FCC, the states, nor the telecommunications industry, have been effective in protecting the consumer from telephone slamming;
- Information provided by all long distance carriers in compliance with FCC-required tariff filing procedures, is not reviewed and is no deterrent to a slammer;

- Some states have taken significant action to protect consumers from slamming, but others have taken little action or have no antislamming regulations;
- The industry approach [to combat slamming] appears to be largely market-driven rather than consumer-oriented;
- Consumers and the industry itself are becoming increasingly vulnerable as targets for large scale fraud;
- Given [the present] environment, unscrupulous long-distance providers slam consumers, often with virtual impunity; and
- The most effective action that consumers can take to eliminate the chance of intentional slamming is to have their local exchange carrier freeze their choice of long distance providers.”

The conclusions reached in the GAO report regarding FCC efforts to deter slamming, were discussed during hearings held, on April 23, 1998, by the Senate Permanent Investigations Subcommittee. Some subcommittee members expressed concern over the GAO's findings to FCC Chairman Kennard, who was called to testify at the hearing. Chairman Kennard defended the FCC's actions stating that the tariff filing procedure that was criticized by the GAO was not developed as a deterrent to slamming and that the FCC is currently working on new rules to strengthen existing policies to combat slamming. He also pointed to the severe punishment taken against Fletcher Companies to defend FCC actions. (See FCC policies, above.)

At the request of Senator Collins, the GAO undertook a second study examining the scope of and state and federal actions taken to combat abuses involving telephone services. The report, which was issued in July 1999, focused on two abuses, slamming and cramming. (Cramming is the practice of placing unauthorized charges for services and products on a consumer's telephone bill.) Among other things the report confirmed that, based on data from 1996 through 1998, “slamming continues to be a significant problem for consumers.” This report, *State and Federal Actions to Curb Slamming and Cramming*, contains information on the number of complaints filed, state and federal regulations taken to protect consumers from such abuses, industry initiatives taken to curb these abuses, as well as state and federal enforcement actions taken against companies engaged in these practices. (For a full citation see For Additional Reading, below.)

Congressional Activity

Notwithstanding existing FCC rules and policies, and the passage of section 258 of the 1996 Telecommunications Act, some Members of Congress felt that additional legislative action was needed to be taken to address slamming. The 105th Congress actively examined this issue, with each chamber passing its version of legislation to protect consumers against slamming. However, adjournment occurred before a final measure could be passed. Legislation to strengthen existing slamming regulations was again introduced in the 106th Congress but was not enacted. No slamming measures were introduced in either the 107th or 108th Congress nor in the 109th Congress, to date. Whether the FCC's strengthened slamming rules and subsequent enforcement actions will be a sufficient deterrent to stop the practice of slamming, and negate congressional interest to enact legislation remains unclear.

Action in the 106th Congress. Two measures, S. 58 and S. 1084, were introduced in the 106th Congress relating to the slamming issue. Senator Susan Collins introduced the “Telephone Services Fraud Prevention and Enforcement Act of 1999” (S. 58), on January 19, 1999. While Senator Collins acknowledged recent FCC actions to strengthen its regulations to deter slamming as “... a step in the right direction” she felt that “... we need to do more to protect consumers...” against slamming. (S. 58 also addresses the practice of cramming. However the issue of cramming, that is the practice of placing unauthorized, misleading, or deceptive charges on consumer’s telephone bills goes beyond the scope of this issue brief.) Senator McCain introduced the “Telecommunications Competition and Consumer Protection Act of 1999” (S. 1084) on May 19, 1999, one day after the court stay of FCC slamming liability rules. Citing the failure of the 105th Congress to pass slamming legislation, court action to stay FCC liability rules (which has since been lifted), and his objection to the industry-proposed third party administrator, Senator McCain offered a comprehensive measure “to better protect consumers.”

S. 58. S. 58 attempted to further deter the practice of slamming by increasing consumer protections and strengthening enforcement at both the federal and state level. Included among the provisions to deter slamming contained in this measure were those that required extensive and written notification and verification requirements when a subscriber switches long distance carriers; specified that Federal law *does not* preempt more restrictive state laws or regulations relating to slamming; authorized stiff penalties for those convicted of slamming including fines of not less than \$40,000 for the first offense and not less than \$100,000 for each subsequent offense. First time “willful violators” would have faced up to a year in prison for a first offense with repeat offenders up to five years. The bill extended FCC authority over violators beyond telecommunications carriers to include others such as billing agents; required local telephone companies to submit to the FCC, on a quarterly basis, a list of the number of slamming complaints received by service provider; allowed consumers to get refunds from unauthorized carriers; and protected consumer’s rights to use the PIC freeze option. (See section on PIC Freeze Programs, below.) S. 58 was referred to the Senate Commerce, Science, and Transportation Committee where no further action was taken.

S. 1084. S. 1084 required the FCC, the Federal Trade Commission, and telecommunications carrier representatives to develop a code of practices to protect consumers from slamming. The code was required to contain, at a minimum, provisions that required companies to verify changes in a subscriber’s service, restricted the use of “negative option marketing,” required subscriber notification of any changes in service, and forbade the use of unfair and deceptive practices. Carriers were required to give subscribers who are victims of slamming credits for unauthorized charges and damages of \$500. Adherence to the code would have been voluntary, but those carriers that chose not to follow the code would have been required to follow regulations prescribed by the FCC. Furthermore, the bill required the FCC to compile and publish a report, every six months, listing slamming violations by carrier. S. 1084 was referred to the Senate Commerce, Science, and Transportation Committee and received no further action.

Action in the 105th Congress. The 105th Congress held several hearings and introduced 11 bills (S. 1051, S. 1137, S. 1410, S. 1618, S. 1740, H.R. 2112, H.R. 2120, H.R. 3050, H.R. 3749, H.R. 3888, and H.R. 4176) to address this issue, but adjourned without passing legislation. S. 1618, the “Consumer Anti-Slamming Act,” passed the Senate(99-0)

with amendment, on May 12, 1998. H.R. 3888 passed the House, as amended, by voice vote, on October 12, 1998. Despite intense negotiations to resolve differences between the bills, the 105th Congress adjourned before H.R. 3888 could be brought to the Senate floor for consideration.

S. 1618. The “Consumer Anti-Slamming Act of 1998” (S. 1618), passed the Senate (99-0) with amendment, on May 12, 1998. This measure sought to combat the increase in slamming by strengthening safeguards to prevent slamming from occurring in the first place, establishing a process to resolve slamming complaints, and increasing the ability to punish those who are guilty of slamming. More specifically, the bill as passed by the Senate, prohibited long distance carriers and resellers (i.e., companies that lease excess capacity of established long distance carriers and then market those services) from changing a subscriber’s long distance provider without the subscriber’s explicit permission. (S. 1618 also applied to the unauthorized initiation of long distance service as well as unauthorized switching.) The local telephone company was prohibited from changing a consumer’s long distance provider, unless the change is accompanied by a verbal, written, or electronic verification from the subscriber. Furthermore, the bill required that the verification be retained. The long distance company or reseller was required to send a written confirmation of the switch that includes the name of the new carrier, the date the switch was authorized, and the name of the person who authorized the switch, to the subscriber within 15 days. The use of negative option marketing, whereby a consumer must take some action to prevent a switch from occurring, was banned.

The bill also strengthened the complaint procedure by requiring a company charged with slamming to resolve the complaint within 120 days; absent resolution of the complaint, the company was required to give the consumer a copy of the retained verification, information about how to pursue the complaint with the FCC, and all other available remedies. Any company that ignored a consumer’s complaint was to be subject to a penalty for slamming.

S. 1618 established both a complaint process at the FCC and minimum monetary penalties for offenders. The FCC was required to establish streamlined complaint resolution procedures and to issue a decision on slamming complaints within 150 days of filing. The FCC was given the authority to award both compensatory and punitive damages and was required to award those damages within 90 days of the liability determination. Minimum levels for fines were established, absent mitigating circumstances, with a fine of not less than \$40,000 for first-time offenders and \$150,000 for each subsequent offense. Individual subscribers could recover damages up to \$500 from slammers and would not have had to pay the slamming carrier but could have elected to pay their designated carrier for those services. The FCC was given the authority to prosecute those who refuse to pay their fines. Those convicted of intentional slamming (“willful” slammers) would have been subject to criminal penalties and would have been prohibited from offering telecommunications services. Switchless resellers were required to post a bond with the FCC before they were able to offer long distance services, thereby assuring some degree of financial capability and that proceeds are available if slamming fines are levied. Furthermore, S. 1618 did not preclude or preempt state law or actions against slammers, and slamming victims were given the option of pursuing slamming complaints through the courts, instead of the FCC, through a state class action suit.

In an attempt to gather additional information on the incidence of and FCC action related to slamming, a number of reporting requirements were also included in the bill. Each telecommunications carrier or reseller was required to report slamming violations to the FCC on a quarterly basis to enable the FCC to identify those that engage in “patterns and practices” of slamming. The FCC was required to submit a report to Congress, by October 31, 1998, identifying the “top ten” carriers that were the subject of the most slamming complaints and the fines assessed by the FCC against all slamming violators in the previous year. (Calculation of the “top ten” was to be based on a ratio of the number of subscriber complaints to the total number of subscribers served.) The FCC was also directed to issue a report, within 180 days of the bill’s enactment, on telemarketing practices used to solicit service provider changes by subscribers, and, if needed, initiate a rulemaking, within 120 days after the completion of its report, to prohibit undesirable practices. This report was also directed to study whether a third party should verify these changes and whether an independent third party should administer these changes.

H.R. 3888. The “Telecommunications Competition and Consumer Protection Act of 1998” (H.R. 3888), passed the House by voice vote, with amendment, on October 12, 1998. The House-passed measure contained a different approach from its Senate counterpart to combat slamming. H.R. 3888 called for the establishment of a voluntary code of conduct as an alternative to FCC regulation to address the issue. Failure to comply with or withdrawal from the voluntary code would result in a carrier being subject to FCC regulation.

The FCC was required, within 180 days of enactment, to establish after consultation with the Federal Trade Commission, state commissions, industry representatives and consumers, a voluntary code of “Subscriber Protection Practices” governing changes in a subscriber’s telephone exchange and/or toll services. The bill enumerated minimum standards to be addressed in the voluntary code, including those dealing with notification, verification, and marketing. Guidelines relating to liability, reimbursements, record keeping, and independent audits were also included. The FCC was required to review the code every two years to ensure that its requirements “adequately protect consumers.” Each carrier was given 10 days within adoption of the code, or commencement of operation, to elect to comply with the voluntary code. Those telecommunications carriers, including resellers, that elected not to comply with the voluntary code, withdrew from such election, or had such election revoked by the FCC, were to be subject to presumably more stringent FCC regulations.

H.R. 3888 also detailed specific, more stringent, minimum requirements to be incorporated into FCC- developed regulations for carriers not operating under the voluntary code. The FCC was also required to compile and a publish a report, on a semiannual basis, ranking carriers by the percentage of verified complaints, excluding those generated by the carrier’s unaffiliated resellers, compared to the number of changes. Carriers listed among the five worst performers (based upon the percentage of verified complaints compared to its number of carrier selection changes) in the semiannual reports for three consecutive times were to be subject to FCC investigation. Carriers found in violation of the voluntary code or found willfully and repeatedly slamming were subject to a fine of up to \$1 million.

Additional provisions in the bill included those that gave subscribers credit for charges incurred when using the slamming carrier’s service; gave state attorneys general enforcement authority under the federal legislation; upheld any state laws regarding slamming that were

less restrictive than those imposed under this bill; and directed the Commerce Department's National Telecommunications and Information Administration to report to Congress on "the feasibility and desirability" of establishing a neutral third party to administer a system to prevent slamming.

The version of H.R. 3888 passed by the House Commerce Committee, and ultimately the full House, was significantly different from the subcommittee-passed H.R. 3888 which was more aligned with the Senate-passed measure. As a result, the House-passed H.R. 3888 contained a significantly different approach to combat slamming from its Senate counterpart, S. 1618. Negotiations between the House and Senate to reconcile differences between the two measures continued through the waning days of the session. Despite such efforts, however, H.R. 3888 was not brought to the Senate floor and legislation to address slamming was not enacted prior to the adjournment of the 105th Congress.

Industry Initiatives

The telecommunications industry has acknowledged the existence of a slamming problem but is not necessarily in agreement with an approach to solve it. The Competitive Telecommunications Association (CompTel), a telecommunications trade association that represents competitive telecommunications service providers, issued a statement that called for "zero tolerance" of intentional slamming but that stressed industry self-policing. CompTel urged carriers to agree to investigate all slamming allegations, repay consumers who have been the victims of slamming, and terminate any employees or agents who "knowingly and willfully engaged in such practices." The statement also advocated uniformity in state and federal slamming requirements, to lessen consumer confusion, and called for the levying of fines, but solely in cases where it has been proven that the carrier "has engaged in willful and intentional slamming...."

Issues

Although no one supports the practice of intentional slamming, some concerns have been expressed over the approaches being taken to curb this practice. One concern has focused on the necessity for, or concern over specific provisions contained in, recent legislative proposals. Two other concerns addressed in pending legislation, have also generated controversy: the implementation of primary interexchange carrier (PIC) freeze programs; and the methodology used by the FCC to develop slamming statistics.

Legislation. Some favor voluntary private-sector initiatives to combat slamming rather than the enactment of legislation. They point to recent industry initiatives, such as the ones discussed above, to support that position. Others support vigorous enforcement of current FCC regulations and continued consumer education to combat the increase in slamming complaints. The enactment of additional legislative measures prescribing new regulations is seen, by some, as an action that is premature and that should be taken only as a last resort if the slamming problem continues.

Others support the enactment of legislation. They cite the trend of the rise in slamming complaints despite existing FCC regulations, as proof that additional legislative action is needed. The extent and growth of the existing problem, coupled with the potential for further abuse, make it necessary, supporters claim, to enact legislation to curb slamming. The

release of a GAO report critical of current FCC efforts to reduce the occurrence of slamming gave supporters of legislation additional impetus in the 105th and 106th Congresses. (See GAO Report, above.) It is up to the Congress, they state, to establish through law stronger measures and increased penalties to protect both consumers and suppliers of telecommunications services from slamming. Those in favor of enactment of legislation also state that FCC regulations directly supported by statute, versus FCC developed policies, are less susceptible to change and will better withstand scrutiny if challenged in the courts. The May 18, 1999 U.S. Appeals Court stay of the liability provisions of the FCC's slamming rules is cited as further proof in support of the need for enactment of legislation.

Those supporting legislative action, however, are not necessarily united in the approach such legislation should take. Some have expressed concern over the breath of the proposed regulations contained in the measures that were considered in the 105th and 106th Congresses and/or individual provisions contained within them. Concern has been voiced by some that the consumer protections that were proposed were too extensive and may be overly burdensome and costly for smaller carriers attempting to compete with the major long distance carriers. Mandatory third party verification is cited as an example of a proposal that would be costly for small carriers to implement. Proposals to require switchless resellers to post a "surety bond" with the FCC to pay for possible fines or penalties also came under criticism. The Telecommunications Resellers Association claims that such a provision not only discriminates against switchless resellers, who are small businesses, but would also cause an "anticompetitive effect" in the marketplace by decreasing consumer choice. Additional concern has also been expressed over the content of other provisions contained in other measures. Provisions, such as ones that give full reimbursement to consumers if they are slammed, instead of solely reimbursement of the overcharge, have generated concerns that it might possibly lead to consumers fraudulently claiming they have been slammed, to avoid paying any charges for long distance calls. Proposals to require slammers to pay fines to consumers they harm could result in the creation of the "wrong incentive structure..." according to AT&T, by rewarding people who have been slammed instead of trying to discipline those who do the slamming. Furthermore, some have expressed concerns that fines and punishments not be levied against the long distance carrier in all cases, since in some instances unwanted switches can be attributed to the local exchange carrier responsible for executing the switch. On the other hand, local exchange carriers have expressed some concerns that they should not be held liable for solely executing a change since short of confirming each switch, they cannot insure that each change is authorized by the consumer.

PIC Freeze Programs and Charges. One practice currently used to prevent slamming is the freezing of a customer's primary interexchange (long distance) carrier, or PIC. The PIC freeze is implemented by the local exchange carrier at the request of the customer, and prohibits the switch of the customer's designated long distance carrier without his/her express approval. In that way slamming is prevented, since the customer's long distance carrier cannot be changed without express permission. While most see the PIC freeze as a viable option to prevent slamming in the long distance market, some concerns have been expressed over the potential for misuse of this option. Some see the potential for the PIC freeze to inhibit competition, if the means required to lift the freeze are perceived by the consumer as too burdensome or the charges to implement the change are excessive.

The FCC, in a March 14, 2002 action, initiated a notice of proposed rulemaking (CC Docket No. 02-53) to address a petition, filed by the Competitive Telecommunications Association, regarding charges levied by ILECs for changing PICs for end users. The Competitive Telecommunications Association felt that the \$5 PIC change charge safe harbor, that was established in 1984, exceeded the actual cost and hampers competition. Upon its initiation of the inquiry, the FCC concluded that “significant industry and market changes have occurred since the implementation of the \$5.00 safe harbor in 1984” and sought comment on FCC policies for regulating PIC change charges. In May 2004 the FCC initiated a further notice of proposed rulemaking in conjunction with this docket to refresh the record regarding PIC change policies and examine cost support information. Subsequently, in a February 10, 2005 action, the FCC adopted a new fee structure that local exchange carriers may charge for interstate PIC changes. Under the new rules PIC change charges, which are borne by the customer, but are commonly picked up by the newly designated interexchange carrier, will be based on the method used to process the request and will be subject to a new safe harbor. The FCC established safe harbors of \$1.25 for electronically-processed PIC changes and \$5.50 for manually processed PIC changes. Local exchange carriers can charge more if they can document higher costs and less than the safe harbor rate if they choose. The FCC has no authority over charges set for intrastate carrier changes which fall under state jurisdiction, however, if a consumer switches intrastate long distance providers and interstate providers at the same time, the PIC charge for changing the interstate carrier is decreased by half, to 63 cents, for electronically processed changes. (See *Federal Register*, vol. 70, no. 49, March 15, 2005, p. 12601.) In an October 14, 2005 action the FCC extended, for a second time, the effective date for the filing of revised PIC charge tariffs to be effective no later than January 1, 2006.

The possible misuse of the PIC freeze through the implementation of an illegal or unauthorized PIC freeze by the customer’s local exchange carrier, absent the customer’s authorization, has also been raised. The extension of the PIC freeze option, beyond the designation of the long distance carrier, to cover the designation of local exchange and intrastate long distance (toll call) carriers, has also raised significant concerns. Some see the expanded use of the PIC freeze option as unnecessary and feel that the PIC freeze is being misused to protect the local exchange carriers market share in the face of growing competition. As incumbent local exchange carriers face increasing competition in the local exchange market and seek to offer long distance service within their service territories, some feel that the potential for abuse of the PIC freeze will become greater. Some support the elimination of local exchange carrier control over the processing of all carrier changes and freezes, and favor the establishment of an independent third party to administer and execute such changes.

Local exchange carriers defend the use of the PIC freeze, arguing that it is an appropriate method to protect consumers against the growing problem of slamming. They assert that there have been no widespread complaints about the manner in which the PIC freeze is implemented and note that the FCC has encouraged carriers to take steps to help prevent slamming. They also state that the manner in which the program is implemented varies from carrier to carrier and that many of the potential and perceived abuses, such as high charges or difficulty in switching, do not apply to most programs. Furthermore, many local exchange carriers claim that they do not actively market the PIC freeze option but only offer it in response to customers who complain about slamming or who specifically inquire about it.

Slamming Statistics. The methodology used by the FCC to develop slamming statistics has also been brought under question. The manner in which the FCC calculates and interprets its slamming statistics has significant ramifications, as several legislative measures required the FCC to report such information to Congress on an annual basis.

The GAO has criticized the methodology used by the FCC to determine the list of top slamming offenders, a list that is published annually by the FCC in its *Common Carrier Scorecard*. The FCC compares slamming offenders by citing the ratio of the number of complaints per million dollars of company revenue. That methodology, according to the GAO, is flawed because it can lead to a severe understatement of the revenue-to-complaint ratio for the smaller companies, or resellers. This occurs, according to the GAO, because resellers are not required to, and generally do not, report their revenue to the FCC unless the revenue exceeds \$109 million. To enable the FCC to make comparisons, to list the top slamming offenders, the FCC assumes that those resellers that have not provided revenue data, had revenues of \$109 million. This assumption, the GAO states, may result in a significant overstatement of the reseller's revenue, resulting in a much lower revenue-to-complaint ratio for that offender.

LCI International Inc., the sixth largest long distance carrier in the United States, has also expressed concern over the manner in which the FCC calculates yearly slamming rates to determine top offenders. Unlike the GAO, LCI claims that the FCC's current practice of dividing the number of slamming complaints by a company's annual telecommunications revenue favors larger carriers. This occurs, LCI states, because the larger a company's revenue the more consumers it can slam without appearing to be a major offender. LCI recommends that the FCC calculate its slamming rate ratio by dividing the number of slamming complaints by the number of new long distance customers, a methodology that LCI feels is more reflective of company behavior.

Legislation in the 105th Congress

H.R. 2112 (Franks)

A measure to amend the Communications Act of 1934 to increase the forfeiture penalty for telephone service slamming and to require providers of such service to report slamming incidents, and for other purposes. Introduced July 8, 1997; referred to Committee on Commerce.

H.R. 2120 (DeFazio)

A measure to amend the Communications Act of 1934 to strengthen and expand the procedures for preventing the slamming of interstate telephone service subscribers, and for other purposes. Introduced July 9, 1997; referred to Committee on Commerce.

H.R. 3050 (Dingell)

A measure to establish procedures and remedies for the prevention of fraudulent and deceptive practices in the solicitation of telephone service subscribers, and for other purposes. Introduced November 13, 1997; referred to Committee on Commerce.

H.R. 3749 (Bass)

A measure to amend the Communications Act of 1934 to improve the protection of consumers against slamming by telecommunications carriers, and for other purposes.

Introduced April 29, 1998; referred to Committee on Commerce. Referred to Subcommittee on Telecommunications, Trade and Consumer Protection May 8, 1998.

H.R. 3888 (Tauzin)

A measure to amend the Communications Act of 1934 to improve the protection of consumers against slamming by telecommunications carriers, and for other purposes. Introduced May 14, 1998; referred to Committee on Commerce. Passed Telecommunications Subcommittee, as amended, by voice vote, August 6, 1998. An amendment in the nature of a substitute offered by Representative Tauzin was adopted by voice vote by the Commerce Committee, on September 24, 1998. Reported out of committee October 8, 1998 (H.Rept. 105-801). Passed House by voice vote, with amendment, October 12, 1998. Received in the Senate October 13, 1998.

H.R. 4176 (Markey)

A measure to amend the Communications Act of 1934 to protect consumers against 'spamming', 'slamming', and 'cramming', and for other purposes. Introduced June 25, 1998; referred to Committee on Commerce.

S. 1051 (Campbell)

A measure to amend the Communications Act of 1934 to enhance protections against unauthorized changes of telephone service subscribers from one telecommunications carrier to another, and for other purposes. Introduced July 22, 1997; referred to Committee on Commerce, Science, and Transportation.

S. 1137 (Durbin)

A measure to amend section 258 of the Communications Act of 1934 to establish additional protections against the unauthorized change of subscribers from one telecommunications carrier to another. Introduced July 31, 1997; referred to Committee on Commerce, Science, and Transportation.

S. 1410 (Reed)

A measure to amend section 258 of the Communications Act of 1934 to enhance the protections against unauthorized changes in subscriber selections of telephone service providers, and for other purposes. Introduced November 7, 1997; referred to Committee on Commerce, Science, and Transportation.

S. 1618 (McCain)

A measure to amend the Communications Act of 1934 to improve the protection of consumers against slamming by telecommunications carriers, and for other purposes. Introduced February 9, 1998; referred to Committee on Commerce, Science, and Transportation. Passed Commerce Committee, as amended, by voice vote March 12, 1998. Reported out of committee May 5, 1998 (S.Rept. 105-183). Passed Senate (99-0), with amendment, May 12, 1998.

S. 1740 (Collins)

A measure to amend the Communications Act of 1934 to improve protections against the unauthorized change of subscribers from one telecommunications carrier to another, and for other purposes. Introduced March 10, 1998; referred to Committee on Commerce, Science, and Transportation.

Legislation in the 106th Congress

S. 58 (Collins)

A bill to amend the Communications Act of 1934 to improve protections against telephone service “slamming” and provide protections against telephone billing “cramming”, to provide the Federal Trade Commission jurisdiction over unfair and deceptive trade practices of telecommunications carriers, and for other purposes. Introduced January 19, 1999; referred to Committee on Commerce, Science, and Transportation.

S. 1084 (McCain)

A bill to amend the Communications Act of 1934 to protect consumers from the unauthorized switching of their long distance service. Introduced May 19, 1999; referred to Committee on Commerce, Science, and Transportation.

FOR ADDITIONAL READING

Federal Communications Commission. Common Carrier Bureau. *Common Carrier Scorecard*. November 1998. Washington, DC. Available at the FCC's website: [http://www.fcc.gov/Bureaus/Common_Carrier/Reports/score_card_98.html].

Federal Communications Commission. Common Carrier Bureau. *The FCC Telephone Consumer Complaint Scorecard*. December 1998. Washington DC. Available at the FCC's website: [http://www.fcc.gov/Bureaus/Common_Carrier/Reports/tccsc98.pdf].

United States General Accounting Office. *Telecommunications: State and Federal Actions to Curb Slamming and Cramming*. GAO/RCED-99-193. July 1999. Washington, DC. Available at the GAO's website: [<http://www.gao.gov>].

United States General Accounting Office. *Telecommunications: Telephone Slamming and Its Harmful Effects*. GAO/OSI-98-10. April 1998. Washington, DC. Available at the GAO's website: [<http://www.gao.gov>].

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